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FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1993

JAMES P. GROENE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. IS JURY INTERROGATION OF WITNESSES INHERENTLY PREJUDICIAL AND DOES IT VIOLATE A DEFENDANT'S RIGHT TO A FAIR TRIAL?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, James P. Groene, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of a divided United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 13, 1993.

On August 17, 1993, the United States Court of Appeals for the Eighth Circuit entered a subsequent order denying the Defendant's Suggestion for Rehearing En Banc.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the Appendix hereto, p. 1, *infra*.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 13, 1993, affirming Petitioner's conviction dated March 3, 1992. The Court of Appeals denied a timely Petition for Rehearing on August 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See p. App. 11, *infra*.

STATEMENT OF THE CASE

Commencing on February 11, 1992, the Defendant was tried by a jury in the United States District Court for the District of Nebraska on four counts of violating the Federal Tax Evasion Statute. During the course of a three week trial, over the continued objection of Defendant's counsel, the judge in this case continually invited the jurors to cross-examine each of the trial witnesses.

On March 3, 1992, jury verdicts were returned against the Defendant and he was sentenced on September 16, 1992. Pursuant to Fed. Rule of App. Proc. 4(b) on January 22, 1993, the Defendant timely filed his appeal with the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for a Writ of Certiorari in this case for the following reasons:

(1) Allowing jurors to ask questions threatens a defendant's Fifth and Sixth Amendment rights to a fair trial and destroys the impartiality of the jury, transforming otherwise independent and disinterested jurors into adversarial participants.

(2) There is no constitutional, statutory or procedural authority in the federal system which authorizes jurors to cross-examine witnesses. Only the parties or the Court are specifically authorized to ask questions.

(3) The burden of proof in a criminal case is always on the government. Jury questions aid the prosecution since evidence adduced in response to these questions augments the prosecutor's case and is used to convict the defendant.

(4) When the Court allows jury questions, it impermissibly places the defendant on the horns of a dilemma. The defendant is prejudiced because he is either forced to risk alienating jurors by objecting; or he must not object to avoid alienating the juror; but, as a result, he will involuntarily waive that objection on appeal.

(5) Jurors who ask questions prejudice the case and begin making up their minds before they have retired to the jury room and before they have begun discussing the evidence with their fellow jurors.

(6) Jury questions unnecessarily create the risk that inadmissible evidence might be adduced against a defendant.

THE DANGERS INVOLVED

The function of a juror is not that of an advocate. A juror is not a party to a lawsuit. Unfortunately, by allowing jurors to ask questions, they become participants in the process. Jurors, by their oath, are to "fairly and truly" try and deliberate on the evidence. It is not their function to develop or adduce evidence.

By permitting a juror to ask questions, the Court allows him to assign evidentiary weight to the very evidence which he adduced. The probability of a juror giving greater weight to that evidence over other evidence is as certain as human nature. Such conduct psychologically gives a juror a stake in the outcome.

Furthermore, neither the Federal Criminal or Civil Rules of Procedure authorize jurors to be involved in the interrogation process. Likewise, neither do the Federal Rules of Evidence. The Rules of Evidence authorize examination of witnesses only by the Court or by the *parties*. (emphasis added)

> Rule 614. Calling and Interrogation of Witnesses by the Court.
>
> (a) Calling by Court. The Court may, on its own motion or at the suggestion of a party, call witnesses, and *all parties* are entitled to cross-examine witnesses thus called.
>
> (b) Interrogation by Court. The Court may interrogate witnesses, whether called by itself or by a *party*.

The Federal Rules of Procedure, as well as the Federal Rules of Evidence, convey the right of interrogation only to the parties. Nowhere do these Rules expressly

authorize juror examination during either party's case-in-chief. "The expression of the one is the exclusion of the other."

In this case, to the detriment of the Defendant, jury questions directly benefitted the government because they permitted the jury, over objection, to re-open the government's direct examination augmenting the government's case-in-chief.

The government, and only the government, carries the burden of proof in a federal criminal prosecution. It is the government's responsibility to adduce the evidence which is sufficient to convict the Defendant. Developing evidence against a defendant is not the function of the jury. In this case, the jury became part of the prosecution team and adduced evidence which may have resulted in the conviction of the Defendant.

A jury's function is to listen to the evidence and from that evidence discover the truth. While a jury trial is a "truth searching process", a jury's function is to seek the truth objectively by weighing the evidence *presented to it by the parties*. Testimony adduced by jurors invades the sanctity and fairness of the trial process and permits jurors to improperly tip the scales in one direction or the other. Jurors who ask questions become inadvertent advocates.

Correspondingly, there are twin dangers. First, juror's questions may result in inadmissible evidence being heard by the jury; or the answers, even if admissible, may encourage the questioner to commence making up his mind before the case is concluded.

Second, when a lawyer objects on the record in the presence of the jury to the Court's invitation to the jury to ask questions, he will, unavoidably, run the risk of alienating the entire panel. Counsel's act of asking the Court to curtail a jury privilege by objecting is a hostile act directed at the jury. It can be perceived in no other way. This situation makes the process unfair to the Defendant, and makes his lawyer a foe of the jury.

Furthermore, when the lawyer objects to a question from an individual juror, he risks alienating that juror because, in order to preserve the record, the Court forces the lawyer to treat a juror in the same manner that he treats an adversary.

When a juror asks an improper question, a lawyer is "damned if he does and damned if he doesn't." What good does it do for the lawyer to object? It is a Hobson's Choice. If the objection is sustained, the Court has forced him to offend a juror. He may win the objection, but by alienating the juror he may lose the case – and he will have no remedy on appeal.

It is for these obvious reasons that the Nebraska Supreme Court has outlawed juror questioning of witnesses in State court under any circumstances:

> Our system is an adversary one which depends upon counsel to put before lay fact finders that which should be admitted in accordance with rules of evidence, and to keep from them that which should not be received in evidence. A change in the system whereby jurors become advocates and possible antagonists of the witnesses does not, on its face, suggest a fairer or more reliable truth-seeking procedure. We,

> therefore, rule that in the trial courts of this state, juror questioning of witnesses is prohibited. *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377.

A juror who asks questions assumes the role of counsel, and in the process moves out of the jury box and much closer to the counsel table. Once this happens justice is defeated because the Defendant is no longer being tried by a jury of his peers.

A DISAPPROVED PRACTICE

The Eighth Circuit has specifically disapproved the practice of allowing jurors to interrogate witnesses.

In considering the practice, this Court in *U.S. v. Land*, 877 F.2d 17 (1989) quoted the Fourth Circuit:

> The practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to the verdict. *DeBenedetto v. Goodyear Tire*, 754 F.2d 512, 516 (4th Cir. 1985).

In subsequent cases, *U.S. v. Gray*, 897 F.2d 1428 (1990) and *U.S. v. Johnson*, 914 F.2d 136 (1990), this Circuit again commented adversely on the matter of jurors being allowed to question witnesses. Chief Judge Lay, together with Judge McMillan, wrote a concurring opinion in *Johnson*, 895 F.2d at 715, addressing the serious practical and "constitutional questions" arising out of this practice. In the words of Judge McMillan, the business of jury interrogation is a "perilous path." *Id.* at 147.

In a footnote to *U.S. v. Gray* at 897 F.2d 1429 (1990), Judge Beam wrote, despite the fact that the Circuit was

affirming a conviction in a case where the jury had been allowed to ask questions, that:

> We, in no way, intend to suggest that trial judges should permit juror questions . . . as indicated in *DeBenedetto* the practice is fraught with danger which can undermine the fairness of the proceeding.

In the instant case, the jury's questions were asked out loud in open Court. The judge then either asked the witness to answer the question as posed, rephrased the question and asked it of the witness, or he called for a bench discussion. With few exceptions, this conduct resulted in additional evidence being introduced against the Defendant by the very jurors who were deciding his case.

Judge Beam, writing in *U.S. v. Gray* at 1929, has advised trial judges in this Circuit that if they are to engage in the dangerous procedure it should be handled in a special way:

> The district court should require jurors to submit questions in writing, without disclosing the question to other jurors, whereupon the Court may pose the questions in its original or restated form upon ruling the question or the substance of the question proper. Quoting *U.S. v. Palowichak*, 783 F.2d 410, 412 (4th Cir. 1986).

Despite these previous admonitions from the Circuit, the trial judge in this case did not alter his practice to even conform to the guidelines suggested by the Circuit.

THE QUESTION OF PREJUDICE

The District Court's invitation to question witnesses and the subsequent jury questioning was inherently prejudicial. First, as a matter of law, jurors should not be permitted to become participants in a trial at which they are the sole judge of the facts. Second, there is no statutory authority nor authority in the Federal Rules which permit cross-examination of witnesses by jurors. Third, jurors who are allowed to ask questions have a tendency to begin making up their minds before they have retired to the jury room. Fourth, the Defendant was prejudiced by being forced to either risk alienating jurors by objecting to preserve the record or to allow the improper questioning to proceed. Fifth, the Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence restrict the interrogation of witnesses to the parties and to the court. Sixth, because of the personal psychodynamics of allowing jurors to participate by questioning there is no way to actually measure prejudice by merely reviewing the questions and answers because any probable prejudice is hidden from view tucked away in the minds of the individual jurors. Seventh, jury questioning unfairly benefits the government by re-opening direct examination, by adducing testimony which can be used to convict a Defendant, by augmenting the government's case in chief before and after it has rested, and by allowing the jury to assist in the burden of proof when that burden always rests with the government.

To date, in various recent opinions, at least eight judges of the Eighth Circuit have voiced strong objections to the practice of jury interrogation. In *U. S. v. Land*, 877 F.2d 17 (1989), the Circuit held that the practice is

"fraught with dangers which can undermine the orderly progress of the trial . . . " In *U.S. v. Johnson*, 914 F.2d 136 (1990), that court wrote concerning the serious "constitutional questions" arising out of this practice. In the words of Judge McMillan, the business of jury interrogation is a "perilous path." In *U.S. v. Welliver*, 976 F.2d 1148, this court held that jury questioning "presents substantial risk of reversal and retrial." In that most recent panel opinion, the panel held that where a record is properly made and the record permits a conclusion that prejudice occurs, reversal and retrial will be the inevitable result.

To date these admonitions have been empty rhetoric because without guidance from the United States Supreme Court the Eighth Circuit is too timid to reverse and remand a single case. Each time the issue has been presented, the Circuit has been unable to find prejudice, despite the fact that both Judges Lay and McMillan have stated the practice is "inherently prejudicial." This is only because the U. S. Supreme Court has given them no formula to do so.

A juror is not an advocate nor a party to a criminal trial. It is not their function to adduce evidence which can be used to convict a Defendant. Yet, by allowing a jury to ask questions, the Court perverts their role and prejudice is immediate. An Appellate Court can review facts but it cannot look into the minds of jurors – jurors who are supposed to "fairly and truly try" a case in an impartial manner. Making jurors interrogators transforms them into inquisitors and by so doing makes them no longer impartial.

Testimony adduced by jurors invades the sanctity of the trial process and permits jurors to improperly tip the scales in favor of the prosecution by adducing testimony against the Defendant. Not only may jury questions result in inadmissible evidence being heard by the jury; but the answers, even if admissible, most probably encourage the juror-interrogator to commence making up his mind at that very moment. More importantly, how can an appellate court ignore human nature and matter of factly find that a juror would not assign greater weight to the answers he receives than to the others given at trial. Similarly, how and by what magical process can a Defendant make or preserve a record for appeal with respect to the thought processes of a juror.

Additionally, when a lawyer is forced to object to jury questions, in what way can he avoid alienating one or more of the jurors? By objecting he is asking the Court to rule against the jury. How else can a jury perceive this other than as a hostile act directed by Counsel to the jury. This unholy process not only makes jurors advocates but turns them into adversaries, and this makes the process unfair to the defendant.

How can an Appellate Court measure this natural alienation or without measuring it say it is not prejudicial. How can an Appellate Court be so presumptuous to think it could, by reviewing a record, adequately gauge a juror's changing mind, measure a juror's hostile attitude, assess a juror's tight-lipped expression or perceive a juror's hidden anger or annoyance. Yet time after time individual Circuits, writing with empty rhetoric about a process being "fraught with dangers", have consistently

affirmed convictions because they inexplicably could find no prejudice.

No doubt future Circuits will continue to find no prejudice until such time as a juror throws a shoe at objecting counsel and accidentally hits the Defendant. Yet, short of that, how can a Defendant ever satisfy a nonexistent formula for showing prejudice when this type of pervasive prejudice is impossible to quantify or even accurately identify. Likewise, how can an Appellate Court ever presume to find such prejudice in a jury filled with silent animosity without being Karnak the Magnificent? Unless the U. S. Supreme Court addresses this question, the petit juries are going to become more like grand juries than independent judges of the facts.

If the various appellate courts mean what they say, that jury questioning is "inherently prejudicial," then that prejudice is inherent in the process itself and does not need to be found in the answers. Accordingly, the U. S. Supreme Court should consider this issue, reverse this conviction and issue an opinion that can be used as a guide for all the Circuits in this country. Not until then will the district courts ever restrict or curtail the practice of jury questions. Not until then will a defendant be guaranteed his constitutional right to a fair and impartial trial by a jury of his peers.

CONCLUSION

For the above stated reasons the Petitioner requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 92-3235 and 92-3332

United States of America,	*	
Appellee/Cross-Appellant,	*	Appeal from the United States
v.	*	District Court for
James P. Groene,	*	the District of
Appellant/Cross-Appellee.	*	Nebraska.

Submitted: May 14, 1993

Filed: June 13, 1993

Before LOKEN, Circuit Judge, ROSS, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In 1991, James Groene, a chiropractor in Schuyler, Nebraska, was indicted on four counts of failure to pay taxes (for 1984, 1985, 1986, and 1987). A year later, after a 10-day trial and three days of deliberation, a jury found Dr. Groene guilty on all counts.

The trial court subsequently sentenced Dr. Groene to 312 days of confinement in the county jail, to be served under conditions allowing work release, followed by 61 weekends of confined community service at a nursing

care center; five years' probation; a fine of $12,000; and payment of restitution in the amount of $115,757.

Dr. Groene challenges his conviction and makes one claim on appeal, namely, that his right to a fair trial was irretrievably compromised by the trial court's practice of allowing jurors to question witnesses. We affirm the trial court on that issue and therefore uphold Dr. Groene's conviction.

The government raises one claim in its cross-appeal, namely, that the trial court abused its discretion in departing from the federal sentencing guidelines by imposing local confinement allowing work release, community service, and probation instead of imprisonment in a federal facility. We reverse the trial court on that issue and remand the case for resentencing.

I.

The trial court in this case allowed jurors to pose their questions aloud. The trial court then either directed the witness to answer, restated the question and directed the witness to answer, or called for a bench conference. Objections were made at the bench conference. Of 29 questions posed by jurors, the trial court allowed 24 to be answered. The jurors were not permitted to ask any questions of Dr. Groene when he testified.

Dr. Groene objected repeatedly to the procedure but did not make any specific evidentiary objection to any particular question. In cases where counsel has objected to some questions from jurors but not others, the court

has reviewed the objected-to questions for abuse of discretion (even where the basis of the objection was an evidentiary ground rather than juror questioning *per se*) and the unobjected-to questions for plain error. *See, e.g., United States v. Johnson*, 914 F.2d 136, 138 (8th Cir. 1990). (The government evidently believes that an abuse-of-discretion standard controls in this case.) Our cases seem to indicate, however, that when the procedure itself is the only basis for objection, the critical inquiry is whether prejudice has resulted from its use. *See, e.g., United States v. Gray*, 897 F.2d 1428, 1429-30 (8th Cir. 1990), and *United States v. Land*, 877 F.2d 17, 19 (8th Cir. 1989), *cert. denied*, 493 U.S. 894 (1989).

The use of the procedure itself is not plain error (prejudicial *per se*). *See, e.g., United States v. Lewin*, 900 F.2d 145, 147 (8th Cir. 1990); *see also United States v. Gray*, 897 F.2d at 1429. Various panels of this circuit, nonetheless, have expressed considerable uneasiness about the practice, especially where, as in this case, the individual jurors posit questions within the hearing of the whole jury. *See, e.g., United States v. Welliver*, 976 F.2d 1148, 1154-55 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993); *United States v. Lewin*, 900 F.2d at 147-48; and *United States v. Land*, 877 F.2d at 19; *see also United States v. Gray*, 897 F.2d at 1429.

The reasons given for being skeptical of the procedure employed here are that juror questioning may tend to transform jurors from neutral fact finders into advocates, that the process of formulating questions may precipitate prematurely the deliberation phase of the trial, that jurors may weigh more heavily the answers to questions from each other than the answers to questions

from counsel, that jurors may ask questions about legally irrelevant and legally inadmissible evidence, and that an objecting party risks alienating the jury. *See, e.g., DeBenedetto v. Goodyear Tire and Rubber Co.*, 754 F.2d 512, 515-17 (4th Cir. 1985) (cited repeatedly by Eighth Circuit panels considering this issue).

In this case, Dr. Groene raises all of those arguments. The government's basic response is that in the context of a 10-day trial, the questions at issue were relatively innocuous, since there were so few of them relative to the length of the trial, and since they elicited only clarifications of previous testimony, cumulative evidence, or evidence that supported Dr. Groene's theory of defense.

After reading the trial transcript, we agree with the government. We believe, however, that if juror questions are allowed, the trial court should carefully weigh using a procedure that requires those questions to be submitted in writing or out of the hearing of (and without discussion with) other jurors, since the practice employed here seems to us to carry serious risks of prejudice to the defendant and even, in a proper case, to the government. *See, e.g., United States v. Welliver*, 976 F.2d at 1154-55; *United States v. Lewin*, 900 F.2d at 147-48; and *United States v. Gray*, 897 F.2d at 1429-30 n.1; *see also United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986), and *DeBenedetto*, 754 F.2d at 516.

II.

The trial court found at the sentencing hearing that the applicable guideline range for Dr. Groene's offenses was 12 to 18 months. Neither probation nor a "split

sentence" of confinement and confined community service is available under the guidelines applicable to Dr. Groene. *See* U.S.S.G. § 5B1.1(b); § 5C1.1(f); and § 5C1.1(f), comment 8. Nonetheless, the trial court made what it characterized as a "lateral departure" and imposed what it considered to be "the equivalent of 15 months in prison, but accomplished in order to make [Dr. Groene's] special services available to persons, particularly elderly persons and children, within the small community of Schuyler, Nebraska, a contingency the Sentencing Commission was unable to take adequately into account, and to make restitution to the government more certain and quicker." The trial court imposed a sentence of 312 days (about 10-1/2 months) of confinement in the county jail, allowing for work release every weekday, followed by 61 consecutive weekends of confined community service at a nursing care center (122 days, or about three months), plus five years' probation, a $12,000 fine, and $115,757 in restitution.

This circuit has adopted a three-step test for reviewing a trial court's departure from the guidelines. "First, as a question of law, [the appeals court] determine[s] whether the circumstances on which the district court based its decision to depart are [legally] sufficient to justify a departure. Second, [the appeals court] review[s] whether the circumstances relied on actually exist. Whether the circumstances exist is a factual determination that can be set aside only for clear error. Finally, with deference to the district court, [the appeals court] review[s] the reasonableness of the degree of departure." *United States v. Sands*, 908 F.2d 304, 306 (8th Cir. 1990).

The government's argument is, first, that the circumstances relied on by the trial court are not legally sufficient to sustain a departure, those circumstances having already been taken into account in the formulation of the guidelines; second, that the circumstances relied on by the trial court do not actually exist in this case; and, third, that the degree of departure was unreasonable.

In its remarks at a preliminary sentencing hearing, the trial court cited multiple letters that it had received from patients of Dr. Groene, all referring to their dependence on his medical skills and to some degree testifying to the high regard with which Dr. Groene is held in the community where he practices. The trial court also indicated that by allowing Dr. Groene to continue to work, restitution could be effected more quickly. The government argues that vocational skills, community support, and ability to make restitution are all specifically excluded by the guidelines as a basis for departure. *See* U.S.S.G. § 5H1.2, policy statement (education and vocational skills), § 5H1.5, policy statement (employment record), § 5H1.6, policy statement (community ties), § 5H1.10, policy statement (socioeconomic status), and § 5H1.11, policy statement (employment-related contributions to community).

Dr. Groene's response to that argument is that while the policy statements to the guidelines do say that those factors are "not ordinarily relevant" (all of the factors except socioeconomic status) or are "not relevant" at all (socioeconomic status), a departure may be sustained on the basis of the considerations noted in an extraordinary case. *See, e.g., United States v. Harrison*, 970 F.2d 444, 447-48 (8th Cir. 1992); *see also United States v. Mogel*, 956

F.2d 1555, 1561-63 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 167 (1992). The question becomes, then, whether the circumstances of this case are so extraordinary as to justify a departure. We hold that they are not.

According to the trial court, Dr. Groene's patients attested to the effectiveness of his chiropractic ministrations in relation to skull asymmetries, headaches, fevers, vision problems, ear infections, sinus infections, allergies, jaw misalignments, tonsillitis, thyroid dysfunctions, back injuries, intestinal difficulties, fertility problems, and joint problems. The trial court then stated, "I don't want that [effectiveness] to be lost for 15 months if it can be avoided." The trial court also remarked, "What I believe is that there are people in the small community of Schuyler who not only depend upon Dr. Groene but live by him. I mean by that, if he's not available to give them medical care they will not receive it. There are those who think there's no other medical care of any substantial quality that's available to them. . . . Not because there [are] no other persons to go to but because they [are] that much committed." The trial court concluded, "[I]t seems to me the sentencing commission didn't and couldn't take into account sufficiently the impact that the absence of this particular physician could have on his local community by being in prison."

The government rebuts these conclusions with an affidavit, also offered at the sentencing hearing, summarizing a telephone survey on the availability of other chiropractors within a 50-mile radius of Schuyler, Nebraska, and in Lincoln, Nebraska (about 70 miles from Schuyler). The results of that survey indicate that at least 23 chiropractors within a 50-mile radius and at least 35

chiropractors in Lincoln are currently accepting new patients. The survey, moreover, does not even address the availability of doctors other than chiropractors. Under these circumstances, we hold that the trial court erred in finding that Dr. Groene's absence from the community would impose such a significant hardship on that community as to justify a departure from the guidelines in this case. We think it wrong to have concluded that this case presents facts sufficiently removed from that "heartland" of cases that the sentencing guidelines are intended to rule. The exigency identified is simply insufficient to warrant a departure in the face of the caveats, already alluded to, contained in the sentencing guidelines.

We therefore remand the case for resentencing in light of this opinion.

LOKEN, Circuit Judge, concurring in part and dissenting in part.

I concur in the court's decision to affirm Dr. Groene's conviction, but I respectfully dissent from its decision to remand this case for resentencing.

We may set aside a district court's departure from the applicable guideline range if the resulting sentence is "unreasonable." 18 U.S.C. § 3742(f)(2). In making such a determination, we "shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). The Supreme Court has cautioned that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular

sentence." *Williams v. United States*, 112 S.Ct. 1112, 1121 (1992).

The district court's decision to depart was based upon factors "not ordinarily relevant" to sentencing under the Guidelines – what Chief Judge Breyer recently described as "discouraged factors." *United States v. Rivera*, 1993 WL 181368 at *4 (1st Cir. June 4, 1993). Such factors warrant departure only if present in unusual kind or degree. The district court recognized this legal constraint on its discretion, but nonetheless concluded that Dr. Groene's vocational skills are sufficiently unusual to warrant a departure. The departure, relatively modest in terms of total punishment, was intended to impose detention without depriving the citizens of Dr. Groene's rural community of his valued services.

As the court seems to recognize, the district court committed no error of law in concluding that these discouraged factors might justify a downward departure in unusual circumstances. Therefore, we are left to review, under a statutory reasonableness standard, the district court's judgment that the circumstances in this case were sufficiently unusual to warrant a departure. We have repeatedly stated that such a departure decision

> involves what is quintessentially a judgment call. District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior "feel" for the case. We will not lightly disturb decisions to depart.

United States v. Passmore, 984 F.2d 933, 937-38 (8th Cir. 1993), quoting *United States v. Lang*, 898 F.2d 1378, 1380 (8th Cir. 1990). I regret that in this case the court has abandoned the wise counsel of these cases and of *Williams* and has instead substituted its judgment for that of the district court. I would affirm the judgment of the district court in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3235/92-3332NEL

United States of America,	*	Order Denying
Appellee/Cross-Appellant,	*	Petition for
	*	Rehearing and
v.	*	Suggestion for
	*	Rehearing En
James P. Groene,	*	Banc
Appellant/Cross-Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 17, 1993✔

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit